

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

27307

FILE: B-213940

DATE: February 1, 1984

MATTER OF: Technical Fiberglass, Inc.

DIGEST:

1. GAO cannot question Small Business Administration Size Appeals Board's interpretation of Small Business Administration regulation.
2. The Small Business Administration, not the General Accounting Office, has the statutory authority to conclusively determine whether a concern is a small business for the purposes of a particular procurement.
3. Contracting officer's alleged failure to provide unsuccessful bidder notice of award of contract is procedural deficiency which does not affect the validity of the award.

Technical Fiberglass, Inc. (T.F.I.), protests the rejection of its bid under invitation for bids (IFB) No. N00024-83-B-2072, issued by the Naval Sea Systems Command (Navy) as a 100-percent small business set-aside. The Small Business Administration (SBA) Size Appeals Board, by decision dated September 6, 1983, determined that the firm did not qualify as a small business "concern" and, therefore, was ineligible for award.

We dismiss the protest.

T.F.I., in its protests to the Size Appeals Board and to this Office, argues that the above-noted board decision should not apply to this procurement because the contracting officer failed to file a timely appeal of an initial SBA Regional Office decision which held that T.F.I. qualified as a small business "concern." T.F.I. points out that under SBA regulations and the Defense Acquisition Regulation (DAR), an appeal from an SBA Regional Office size determination must be filed with the SBA Size Appeals Board within 5 working days from the date of receipt of the regional office's decision. 13 C.F.R. § 121.3-6(b) (1983); DAR § 1-703(b)(4) (Defense Acquisition Circular (DAC) No. 79-19, July 1979). The contracting officer received the regional

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office's decision on June 16, 1983; however, he did not file an appeal with the Size Appeals Board until August 11, 1983.

In considering T.F.I.'s protest, the Size Appeals Board, citing prior SBA decisions, ruled that the appeal time provisions contained in 13 C.F.R. § 121.3-6(b), supra, do not apply to contracting officers. The board explained that the regulation provides that the time restrictions are imposed only to prevent delay in urgent procurements and that it would be illogical to impose time appeal limits where the contracting officer is not concerned with the timeliness of the award. The board further stated that a contracting officer may question the size status of a bidder at any time after bid opening and, therefore, concluded that the Navy's appeal was timely. See 13 C.F.R. § 121.3-5(a) (1983).

It is well settled that "deference [is to be accorded] to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965), and cases cited in text; Colorado State University, B-194627, December 27, 1979, 79-2 CPD 438. Therefore, we will not question the Size Appeals Board's determination regarding the appeal time provisions contained in 13 C.F.R. § 121.3-6(b). Moreover, the provisions of DAR § 1-703(b) (DAC No. 76-19, July 1979) (the regulation concerning an initial post-bid-opening size status protest to the SBA Regional Office with timeliness restrictions similar to those in 13 C.F.R. § 121.3-6(b), supra) make it clear that contracting officers are not bound by the timeliness restrictions contained in that regulation. See Keco Industries, Inc., 56 Comp. Gen. 878 (1977), 77-2 CPD 98.

T.F.I. also challenges the SBA Size Appeals Board's determination that the firm does not qualify as a small business "concern" for the purpose of this procurement. T.F.I., an affiliate of a Canadian firm, acknowledges that it has no financial or product history in the United States and, therefore, does not qualify as a "concern" under SBA regulations which define a "concern" as an entity with a place of business in the United States which makes a significant contribution to the United States economy through the payment of taxes and/or use of American products or labor. 13 C.F.R. § 121.3-2(i) (1983). However, the protester argues that the firm qualifies as a business "newly entering a manufacturing activity," i.e., a manufacturer, under the

Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1976), and that the SBA should apply the Walsh-Healey rule rather than the SBA definition in determining whether a new American firm like itself should be considered a "concern" for small business set-asides. See C.F.R. § 50-206.51(a) (2)(b) (1983).

The SBA is empowered by statute to conclusively determine matters of size status for federal procurement procedures, 15 U.S.C. § 637(b) (1982). It is the duty of the SBA, not this Office, to determine whether a "concern" is a small business concern for the purposes of a particular procurement and SBA's determination is not subject to our review. International Alliance of Sports Officials, B-210172, September 15, 1983, 83-2 CPD 328; BOSTI, Inc., B-200502, October 15, 1980, 80-2 CPD 282. Therefore, we will not review that determination here. Furthermore, whether a concern qualifies as a "manufacturer" under the Walsh-Healey Act is irrelevant as to whether the same concern qualifies as a small business "concern" for small business set-aside size status purposes. See 13 C.F.R. § 121.3-2(r) (1983).

Finally, T.F.I. complains that while the firm's petition for redetermination of the Size Appeals Board's September 6, 1983, decision was pending, the contracting officer failed to notify T.F.I. that on September 29, 1983, award was made to the second low bidder. By letter dated November 8, 1983, the board dismissed T.F.I.'s petition. Apparently, T.F.I. is protesting the award prior to the decision on its reconsideration petition.

DAR § 1-703(b)(3)(iv) (DAC No. 76-40, November 1982) provides that, where a size status appeal is filed prior to award, the contracting officer only is required to suspend procurement action until either receipt of the Size Appeals Board's determination or expiration of a 30-day period from the date the protest was initially filed with the SBA Regional Office. Hoffman - Whitehead, Co., B-208472, August 30, 1982, 82-2 CPD 186.

Here, the contracting officer initially referred the matter of T.F.I.'s size status to the SBA's Regional Office in May 1983. Thus, the award made on September 29, 1983 (several months after that initial protest and after the Navy received the Size Appeals Board's September 6, 1983, decision), was proper. Hoffman - Whitehead Co., supra; McCarthy-Farrell Construction Company, B-187355,

September 23, 1976, 76-2 CPD 279. Further, the protester was not prejudiced by the contracting officer's alleged failure to notify the protester of award in view of the eventual SBA denial of the reconsideration petition. In any event, such notice is a procedural irregularity and does not affect the validity of an otherwise proper award. A&R Window Cleaning & Janitorial Service, Inc., B-197612, March 28, 1980, 80-1 CPD 231; Leon Whitney, Certified Public Accountant, B-190792, December 19, 1978, 78-2 CPD 420.

Protest dismissed.

Harry R. Van Cleve

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